



June 20, 2000

Mr. Bruce P. Sadler
Assistant District Attorney
47th Judicial District of Texas
501 Fillmore, Suite 1A
Amarillo, Texas 79101-2449

OR2000-2348

Dear Mr. Sadler:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 136309.

The Potter County District Attorney (the "district attorney") received a request for information relating to a sexual assault case. The request was made by the victim's attorney. You inform us that you already have released some of the responsive information to the requestor.¹ You seek to withhold other portions of the requested information under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

Section 552.101 of the Act excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Statutory confidentiality under section 552.101 requires express language providing that certain information is confidential or that it shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987). The information that you submitted as Exhibit J contains criminal history record information ("CHRI") that is confidential under federal and Texas law. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not

¹We note your representation that, in releasing the information that you identify as Exhibit B, the district attorney withheld driver's license information pursuant to section 552.130 of the Act. As the authorized representative of the crime victim, the requestor has a special right of access, beyond the right of the general public, to responsive information such as a driver's license number that relates to the crime victim and that is protected from public disclosure by laws intended to protect her privacy interests. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 5 (1987) (stating that where an individual asks a governmental body to release information concerning only that individual, no common law privacy interest arises, and the individual is entitled to that information if the governmental body can claim no other basis for denying access to it).

be eligible to receive the information itself.”). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety (the “DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, you must withhold the criminal history record information in your Exhibit J under section 552.101 in conjunction with the foregoing provisions of federal and state law.

You also seek to withhold information that would reveal the identities of certain individuals who provided affidavits to the Amarillo Police Department in connection with its investigation of the case and who stated that the disclosure of their identities would harm the prospects of their future cooperation as witnesses. We understand you to be raising section 552.101 in conjunction with the common law informer’s privilege.² Section 552.101 also protects information made confidential by judicial decision, and Texas courts have recognized the “informer’s privilege.” *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53 (1957), the United States Supreme Court explained the rationale that underlies the informer’s privilege as follows:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of *violations of law to officers charged with enforcement of that law*. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity*, encourages them to perform that obligation. [Emphasis added.]

Id. at 59. The “informer’s privilege” aspect of section 552.101 protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer’s privilege does not apply. *See Open Records Decision Nos. 515 (1988), 191 (1978)*. The privilege does not protect the contents of communications that do not reveal the identity of the informant. *Roviaro v. United States*, 353 U.S. at 60. Further, because part of the purpose of the informer’s privilege is to prevent retaliation against informants, the privilege does not apply when the informant’s identity is known to the individual who is the subject of the complaint. *See Open Records Decision No. 208 (1978)*. In this instance, the information that you seek to withhold under the informer’s privilege relates to individuals whose identities either already were known or subsequently were revealed to the individual whose conduct was the subject of the witnesses’ statements. Accordingly, the witnesses’

²As it protects the interests of the governmental body in obtaining information from an informer, and not those of the individual whose identity the governmental body seeks to protect, the informer’s privilege is waived if the governmental body fails timely and properly to assert it. *See Open Records Decision No. 549 at 5-6 (1990)*.

identities are not excepted from disclosure under section 552.101 in conjunction with the common law informer's privilege.

You seek to withhold other requested information under section 552.108 of the Act, the "law enforcement" exception. Section 552.108 provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

....

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a)(3). A governmental body that claims an exception to disclosure under section 552.108 must sufficiently explain, if the responsive information does not do so on its face, how and why section 552.108 is applicable. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). In this instance, you inform us that some of the requested information consists of records prepared by an attorney in anticipation of or in preparation for criminal litigation. Having reviewed the information that you submitted as Exhibit K, we conclude that you generally may withhold that information under section 552.108(a)(3). We note, however, that if the letters addressed to Dean Roper, dated August 15 and September 8, 1999, actually were sent to the addressee by the district attorney, they are not excepted from disclosure under section 552.108(a)(3) and must be released. You also must release the internal memorandum, which we have marked, that describes a telephone call from the victim's mother.

In summary, criminal history record information is confidential and must be withheld from disclosure under section 552.101 in conjunction with federal and state law. Section 552.101, in conjunction with the common law informer's privilege, does not protect the names of witnesses whose identities are known to the individual about whom they gave statements to the police department. Except as specified above, information that was prepared by an attorney in anticipation of or in preparation for criminal litigation is excepted from disclosure under section 552.108(a)(3).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

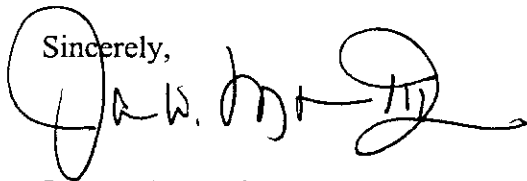
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 136309

Encl. Submitted documents